No. 83-2144

In The
Supreme Court of the United States
October Term, 1983

SAMUEL P. GARRISON, et al.,

Petitioners,

vs.

JAMES HUDSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. IS THE REFORMATION OF AN ISSUE ON APPEAL INTO A DIFFERENT ONE THAN THAT RAISED IN STATE COURT A VIOLTION OF *DUCKWORTH V. SERRANO*, 454 US 1 (1981)?

II. IS A DISTRICT ATTORNEY'S VOUCHING FOR HIS CASE A VIOLATION OF THE CONCEPT OF FUNDAMENTAL FAIRNESS WHEN THE DISTRICT ATTORNEY DOES NOT INDICATE HE HAS OTHER EVIDENCE OF AN ACCUSED'S GUILT HE DID NOT PUT BEFORE THE JURY?

III. IS THE COURT OF APPEALS' DECISION IN THE INSTANT CASE APPROPRIATE IN LIGHT OF THE DIFFERING ROLES OF THE FEDERAL JUDICIARY ON DIRECT APPELLATE AND COLLATERAL REVIEWS?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Samuel P. Garrison, Warden, and the Attorney General of the State of North Carolina, Rufus L. Edmisten, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *Hudson v. Garrison,* No. 83-6300, unpublished, (4th Cir., Apr. 18, 1984) reversing *Hudson v. Garrison,* Civil No. ST-C-81-141, unpublished, (WDNC, June 15, 1982).

OPINION BELOW

The opinion of the United States Court of Appeals is not reported but a copy of it is attached as Appendix C to this petition (App. 20). The District Court opinion is attached as Appendix B (App. 6) while the relevant portion of the petition is attached as Appendix A (App. 1).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC §1254(1) within ninety days of the date of the Court of Appeals' decision, April 18, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI. In all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury of the state and district wherein the crime shall have been committed. . . .

Amendment XIV. Section I. . . . No state shall . . . deprive any person of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

James Hudson was convicted at the August 15, 1977 Session of Iredell County, North Carolina, Superior Court, Honorable Frank W. Snepp, Judge Presiding, upon a not guilty plea in cases number 17 CR 1891 and 1902 in which he was charged with murder and armed robbery respectively. Upon being found guilty after trial by jury, he was sentenced to life imprisonment for the offense of murder in the first degree, the armed robbery charge having merged with the murder conviction under state law. Hudson thereafter appealed his conviction to the North Carolina Supreme Court which court, in an opinion filed 14 July 1978 and reported at 295 NC 427, found no error. He was represented at trial and on appeal by C. David Benbow, Esquire, court-appointed counsel from the Iredell County Bar. Subsequently, Hudson filed a *pro se* application for post-conviction relief in the Superior Court of Iredell County on or about May 7, 1981 which was denied on May 8, 1981 by order of Honorable Robert A. Collier, Jr., Judge Presiding, with the North Carolina Supreme Court denying an application for a writ of certiorari to review Judge Collier's order on August 31, 1981. A writ of habeas corpus was then sought from the United States District Court for the Western District of North Carolina on December 7, 1981. The habeas application contained the same issues previously submitted to the courts of the State of North Carolina and therefore Hudson had exhausted state remedies at the time he filed his federal action. By order filed June 15, 1982, Honorable Robert D. Potter, United States District Judge for the Western District of North Carolina, denied relief without a hearing. The United States Court of Appeals for the Fourth

Circuit, however, reversed Judge Potter by its April 18, 1984 decision.

———o———

STATEMENT OF FACTS

Hudson was convicted for a 1972 murder in a 1978 trial in which each side presented four witnesses. The evidence against him was supplied mostly by a confederate, Garris, as the identification evidence against Hudson was excluded as having been obtained in violation of his right to counsel. He and another, already convicted confederate, Linder, testified that he was innocent and two of Garris' fellow inmates testified about their jail talk in which Garris indicated no knowledge of the crime. On cross-examination, Hudson was asked about his prior convictions for purposes of impeaching his credibility. He admitted two prior convictions and was questioned about a prior possible rape conviction as follows:

Q. You are James Hudson?

A. That's right.

Q. Convicted November 21, 1966, of rape?

A. No.

Q. Do you deny that?

A. I deny that.

Q. Convicted February 17, 1967, for Assault on a Female?

A. True.

Q. Convicted October 3, 1968, for Larceny?

A. True.

Q. Do you deny being convicted of Rape November, 1966?

A. I deny it.

Q. In Mecklenburg County?

A. That's right.

Q. You swore to tell the truth up there, didn't you?

A. I did.

The Court: Don't make any comments.

In the argument to the jury at the end of the trial, the district attorney's remarks included the following:

> All I want to say to you is this. The State of North Carolina would not have offered the testimony of James Donald Garris if we didn't believe it was true. . . . I don't imagine anybody enjoys being part of a killing and a part of a robbery, except those people that are mean. Boys, don't you kid yourself, there is a lot of mean people in this world, they will kill you for a nickel, steal everything you have got, *rape you*, beat you up, and ultimately kill you. They are mean. James Hudson, the defendant seated over here with a shirt and tie on, look at him—he is mean—he is mean. . . . .

In the District Court, Hudson claimed that his lawyer's failure to object to the questioning (but not the argument) constituted ineffective assistance of counsel and, at one place in his two and a half page legal memorandum on this matter also stated that it "[violated] the defendant's Fourteenth Amendment right to due process" (App. 5).

In the District Court, through oversight of the undersigned, the case was treated solely from the standpoint of ineffective assistance of counsel. Judge Potter, however, in dismissing the petition treated it from both due process and ineffective assistance of counsel grounds and denied

relief without either calling for an additional answer from the respondents on the due process aspect or dealing with forfeiture of the issue for nonobjection, which should have been the primary basis for denial of relief. On appeal to the Fourth Circuit, appointed counsel then claimed that vouching by the district attorney for his case was involved because of the following statements in the jury argument:

> Sure, I offered him what has been called "immunity" —I agreed not to prosecute him after talking with that officer and with Agent Lester. I decided then we had to have his testimony to bring the criminals to justice who had perpetrated this crime. . . . I said, I don't particularly like this, are you sure about it—absolutely—so I signed the agreement saying I would not prosecute him because that's the only way I had as your District Attorney to bring guilty people to justice. . . . When I had the chance to arrest them and my officers came to me and said, yes, sir, we have information we need, Mr. Zimmerman, you better believe I did waht [sic] I did and I would do it again.
>
> * * *
>
> *I will guarantee you* that James Garris knows enough when his attorney told him not to say anything, he is not going to say one single thing, because his attorney, Mr. Field, was the one dealing with Lester and Cook and came to them and said, here is evidence, I have got evidence in the Lineberger killing.
>
> * * *
>
> It ain't the most beautiful case I ever prosecuted, *I'm not going to tell you any lie*—it has some holes in it. A five year old Murder and Robbery is going to have holes in it, but *thank the good Lord we have got the people who did it.*
>
> * * *

> You think these officers right here of this county and the SBI are going to manufacture something to try to convict somebody;—not in my district they are not! I looked into this case with Mr. Cook when we first had this information. I wanted to be absolutely sure about what James Garris had to say. . . . Why does he come tell you this—because he is telling you the truth, because his attorney said and Cook said, he wanted to get it off his chest and clear everything up. . . .
>
> • • •
>
> When I have knowledge from my officers and the SBI that a man has committed Murder and Armed Robbery and participated in it by heavens, I'm going to bring him to justice. I can't—don't care if I have to use the devil himself to convict because as I said before, when you try the devil, you have to go to hell to get your witnesses and I mean that.
>
> • • •
>
> It would be nice . . . if I had some fingerprints and they said, yes, sir, they are his prints, but I didn't have anything except James Garris, that's all I have got; I have a man who has come in here and told you what the State says is the truth. If I didn't believe it, I could throw this case out myself. I have that authority.
>
> All I want to say to you is this. *The State of North Carolina would not have offered testimony of James Donald Garris if we didn't believe it was true.* (Emphasis supplied.)

The Fourth Circuit held that the reference to rape in the argument plus vouching by the district attorney for his case together constituted a violation of the Fourteenth Amendment. The Court of Appeals did not identify which of the above it felt to be vouching but respondents argued that only the last constituted this.

This resolution of the case by the Court of Appeals developed in an unusual fashion. As noted before, the District Court response dealt only with ineffective assistance of counsel although there was a single reference to the due process clause. The District Court decision, in turn, went on for three pages on due process yet omitted the apparent proper basis of dismissal—forfeiture. The Fourth Circuit had petitioner's due process argument presented in the terms dealt with by the District Court for the first five pages of Hudson's brief, then in terms of other supporting aspects, three pages of which were devoted to supposed vouching which Hudson asserted was sufficient in and of itself to cause reversal. Respondents treated this in their brief as follows:

> Petitioner first contends his right to a fair trial was violated by the prosecutor's cross-examination about and reference in the jury argument to a possible rape conviction, in conjunction with a jury argument that contained some vouching for the credibility of the State's case and witness. The jury argument aspects were not raised or dealt with below and presumably are used in the context of this appeal only to try and establish that any prejudice the cross-examination caused was magnified by the other aspects of the trial. Judge Potter *sua sponte* rejected the possibility that the cross-examination caused a fundamentally unfair trial; the correctness of this decision is not changed by its reexamination in light of Mr. Zimmerman's jury argument and Judge Potter's decicision should be affirmed, although the primary basis of this should be forfeiture.

The Fourth Circuit, in turn, decided the case on an amalgam, the largest part of which seems to have been vouching, an issue not raised below and which the record showed there was no exhaustion of State remedies on.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals Approach In Two Instances Is In Conflict With Decisions Of This Honorable Court And In One Instance Creates A Conflict In The Circuits Which Should Be Resolved.

Three points dictate acceptance of this case by this Honorable Court and reversal of the Court of Appeals either summarily or with full briefing and argument.

The first is non-exhaustion of state remedies. The Court of Appeals' approach reformed the issue from one dealing with a reference to rape in the cross-examination alone to one dealing mostly with jury argument, and vouching as the unconstitutional part of it. This was not presented in the District Court or to the state court and therefore *Duckworth v. Serrano,* 454 US 1 (1981) was not followed by the Court of Appeals.

More basically though, the Fourth Circuit's viewpoint is contrary to the authority in the rest of the circuits on vouching. These cases hold that vouching is not reversible error (and hence not unconstitutional under the standards of *Donnelly v. DeChristoforo,* 416 US 640 (1974) and *Berger v. United States,* 295 US 78 (1935)) unless accompanied by an indication that the district attorney has some unrevealed evidence of guilt, see e.g. *Passman v. Blackburn,* 652 F.2d 559 (5th Cir. 1981), *Soap v. Carter,* 632 F.2d 872 (10th Cir. 1980), *Hayton v. Egeler,* 555 F.2d 599 (6th Cir. 1977), *Donnelly v. DeChristoforo,* 473 F.2d 1236 (1st Cir. 1973), *United States v. Fay,* 350 F.2d 400 (2nd Cir. 1965). Otherwise, although expression of opinion is not ethically permitted, ". . . at least the jury knows that

the prosecutor is an advocate and it may be expected, to some degree, to discount such remarks as seller's talk", *Donnelly v. DeChristoforo,* 473 F.2d at 1238. *i.e.* there is minimal prejudice.

Finally, although error alone is not a basis for obtaining certiorari, the Court of Appeals has failed to follow the role differentiation most recently noted in *United States v. Frady,* 456 US 152 (1982). The Court of Appeals held that jury impartiality was undermined and this created a fundamentally unfair trial. This means the end result of its decision is that two instances of at-most ordinary, evidence-related, trial error not involving express constitutional rights have been tied into one and thereby found to have been error of constitutional magnitude. But the jury's impartiality here would have been no more affected than in any other case of irrelevant or misstated evidence and the Court of Appeals' decision represents a failure to differentiate between its direct appellate review role and its collateral review role. It may well have been wrong for the district attorney to say he believed his witness truthful—most courts say it is; and it may well have been wrong to have mentioned rape in the jury argument when there was no evidence of it. But to equate this with conduct so bad that it can be described in terms of being "fundamentally unfair" puts it on a par with such things as depriving an accused of a lawyer, of a defense, of dignified and even-handed treatment of his case and witnesses, and of the right to challenge the state's case, to name a few. It simply is not in that ballpark.

———o———

CONCLUSION

It is respectfully argued that because of the above, a writ of certiorari should issue to review and reverse the decision of the Court of Appeals.

Submitted as the petition for writ of certiorari on behalf of Samuel P. Garrison and Rufus L. Edmisten, this 25th day of June, 1984.

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APPENDIX A

JAMES HUDSON,

Petitioner,

v.

SAMUEL P. GARRISON, WARDEN,

Respondent,

and

THE ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, RUFUS L. EDMINSTEN,

Additional Respondent.

(Filed Statesville, N.C. December 7, 1981)

* * *

A. Ground one: Ineffective Counsel

Supporting FACTS (tell your story *briefly* without citing cases or law): Petitioner's counsel was ineffective because counsel failed to object to during trial certain allegations and failed to raise these certain allegations on appeal and these certain allegations are: (A) Prosecutor's misuse of defendant's prior misconduct, (B) Failure to instruct on degrees of offense, (C) Double jeopardy, (D) Insufficient evidence, (E) Ineffective representation of court-appointed counsel. Counsel's failure to object to said allegations at trial and failure to raised said allegations on direct appeal deprived petitioner of a fundamentally fair trial.

* * *

In support of Petitioner's claims of substantial constitutional denial of rights, he says:

Support of Allegations by Defendant:

1. *Ineffective Counsel:*

   A. Prosecutor's misuse of Defendant's prior misconduct

   The prosecutor incorrectly asked the defendant, in the presence of the jury about a charge the defendant was never charged with, indicted for, or convicted of.

   Q. You are James Hudson?

   A. That's right.

   Q. Convicted November 21, 1966, or (sic) Rape?

   A. No!

   Q. Do you deny that?

   A. I deny that.

   Q. Convicted February 17, 1967, for assault on a female?

   A. True.

   Q. Convicted October 3, 1968 for Larceny?

   A. True.

   Q. Do you deny being convicted of Rape November 1966?

   A. I deny it.

   Q. In Mecklenburg County?

   A. That's right.

Q. You swore to tell the truth up there, didn't you?

A. I did. (TT p 137)

The prosecutor can only ask Petitioner about *convictions,* not charges, indictments, acquittals, or crimes never charged to the defendant. *State v. Williams,* (N.C.) "Defendant was never convicted of rape."

The examination by the prosecutor of a defendant's prior misconduct has been the subject of two (2) Fourth Circuit decisions: *Watkins v. Foster,* 570 F 2d 501 (4th Cir 1978), and *Foster v. Barbour,* 613 F 2d 59 (4th Cir 1980). In *Watkins v Foster,* supra., Petitioner was convicted of burglary. The only evidence linking the defendant with the crime was a fingerprint on a flower pot in the burglarized home. No identification was made of Foster and he presented alibi testimony. In cross-examination, the prosecutor questioned the petitioner concerning unrelated prior acts involving the breaking into people's homes. The petitioner denied each of them. One of the indictments charging petitioner with this offense had already been dismissed and the remaining indictments were all soon dismissed after the trial for insufficient evidence. The Fourth Circuit recognizes North Carolina's rule permitting cross-examination of a witness concerning prior acts of misconduct for the purpose of impeachment. (The rule in North Carolina is that the cross-examiner is bound by the witness's answer and may not offer extrinsic evidence.)

The conviction was reversed because even though the defendant answered the questions negatively, the court felt that the answers left an indelible impression on the minds of the jurors. The evidence against the petitioner was

extremely tenuous and the court believed that this fact provided an inference that the improper cross-examination might have contributed to the conviction. The court further noted that the trial judge gave no limiting instruction concerning use of the evidence.

In *Foster v. Barbour,* supra, petitioner was convicted of First-degree murder. The petitioner took the stand and was cross-examined concerning prior arrests and specific acts of misconduct. The petitioner was questioned concerning whether he had been convicted of four charges of larceny from stores, robbery of an individual, possession of marijuana, receipt of stolen goods, resisting arrest, and larceny from two other stores. The petitioner denied all convictions except the possession of marijuana and resisting arrest. During the cross-examination, the prosecutor leafed through a group of official-looking papers. The court emphasized that the prosecutor did not question the petitioner concerning any specific acts of misconduct but rather phrased his questions as if petitioner had convictions for the acts.

Additionally, the court noted the credibility of petitioner's testimony played a critical role in the trial. The state's evidence came primarily from a co-defendant who was charged with second-degree murder in exchange for his testimony against petitioner. The court held that the petitioner's denials of the prosecutor's accusations could not erase the damage to his character created by the persistent questioning and apparent use by the prosecutor of court documents. (A review of the District Court's decision in *Foster v. Barbour,* 462 F. supp. 582 (W.D.N.C. 1978), shows that the case was extremely thin against the

petitioner except for the co-defendant's direct implication of the defendant.)

Defendant in the instant case, like *Foster and Watkins,* used his own testimony as the linchpin of his defense. Defendant's evidence relied solely on his own testimony. In addition, like *Foster v. Barbour,* the only evidence that linked defendant with the felonies of Armed Robbery and First-degree murder was the testimony of a co-defendant. Plus, the prosecutor repeatedly asked wasn't the defendant convicted of rape after the defendant told him no on several occasions. [This persistent questioning on the alleged conviction of rape can be construed as a form of intimidation which vilated (sic) the defendant's 6th Amendment right to a fair and impartial trial which also violated the defendant's 14th Amendment right to Due Process.]

Defendant's counsel was ineffective because the said allegation was not raised at the trial stages and on appeal. Because said allegation was a basis for overturning defendant's conviction, defendant's counsel was ineffective. *Marzullo vs. Maryland,* 561 F. 2d 540 (4th Cir 1977).

APPENDIX B

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
STATESVILLE DIVISION

ST-C-81-141

FINAL ORDER
OF DISMISSAL

JAMES LEE HUDSON,
Petitioner,

vs.

SAMUEL P. GARRISON, Warden; and the Attorney General of North Carolina, RUFUS L. EDMISTEN,
Respondents.

FINAL ORDER OF DISMISSAL
Filed June 15, 1982

James Lee Hudson, Petitioner, was convicted of first degree murder and armed robbery during the August 15, 1977 Session of the Superior Court for Iredell County. Since the state had prosecuted the case on a theory of felony-murder, the trial judge merged the armed robbery charge with the murder charge and sentenced Petitioner to a single term of life imprisonment. The Supreme Court of North Carolina affirmed Petitioner's conviction in an opinion reported at 295 N.C. 427 (1978).

On December 20, 1978, Petitioner filed in this Court a petition for a writ of habeas corpus. Judge Woodrow Wilson Jones dismissed the petition on November 8, 1979, and the Court of Appeals affirmed in Case No. 79-8504, filed August 4, 1980.

On December 7, 1981, Petitioner filed this second petition for a writ of habeas corpus, alleging various instances where he received ineffective assistance of counsel. Because this Court finds Petitioner's contentions to be without merit, the Attorney General's Motion to Dismiss will be granted.

Statement of the Case

The evidence presented at trial showed that in the early evening of June 29, 1972, three black men, armed with guns, robbed Lineberger's Service Station and Grocery store, located in the vicinty of Mooresville, North Carolina. A fourth black man waited at another location according to a prearranged plan. During the robbery, Mr. Bob Cavin drove up to the store with his wife and saw a black man run from the store to a light blue Ford pick-up truck occupied by two other black men. The truck then pulled away at a high rate of speed.

Entering the store, Mr. Cavin found Lathan Lineberger bleeding profusely from a gunshot wound in his neck. The state offered evidence which showed that a large sum of money was missing from the store and that Lineberger died as a result of a gunshot wound to his neck.

James Garris, the principal witness for the state, confessed to being an accomplice to the crime and testified against Petitioner in return for a grant of immunity.*

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*Apparently, up until Garris's confession, the Lineberger robbery/murder had been a five-year-old unsolved crime. Garris was not a suspect in the case at all, but while in jail on another charge, he had his attorney inform the district attorney that he had knowledge of the unsolved crime and would make a statement and testify in exchange for immunity.

Garris testified that Petitioner and another man by the name of Mackey entered the store to rob it while he waited in the truck outside. He heard one shot and then the two men ran out of the store and jumped into the truck as another car pulled into the parking lot. Garris further testified that he received $60.00 as his share of the stolen money.

On cross-examination, Garris admitted that he received immunity, and a stipulation was entered into evidence that he had implicated individuals in two other related crimes who were either dead or in prison at the times he said they committed the offenses.

The defendant took the stand in his own behalf and denied participation in the crime. Two other prisoners from the Iredell County Jail, who had met and talked with Petitioner in jail, also testified. Both prisoners indicated that Garris had denied any knowledge of the robbery and murder and had asked where the robbed store was located.

Conclusions of Law

In his present petition for a writ of habeas corpus, Petitioner asserts that he received ineffective assistance of counsel in that his attorney failed to object to, argue on appeal, or otherwise present the following five points:

(1) the prosecutor's misuse during cross-examination of his prior bad acts;

(2) the court's failure to instruct on lesser degrees of homicide;

(3) the fact that he was twice placed in jeopardy;

(4) the uncorroborated testimony of a co-defendant who had been granted immunity amounted to insufficient evidence; and

(5) the fact that he had passed a lie detector test.

It appears from the record and this Court finds that Petitioner has properly exhausted his state court remedies as required by 28 U.S.C. §2254 and is thereby entitled to this Court's substantive review.

In his first contention, Petitioner refers to the following portion of his cross-examination by the district attorney:

Q. You are James Hudson?

A. That's right.

Q. Convicted November 21, 1966, of Rape?

A. No.

Q. Do you deny that?

A. I deny that.

Q. Convicted February 17, 1967, for Assault on a Female?

A. True.

Q. Convicted October 3, 1968, for Larceny?

A. True.

Q. Do you deny being convicted of Rape November, 1966?

A. I deny it.

Q. In Mecklenburg County?

A. That's right.

Q. You swore to tell the truth up there, didn't you?

A. I did. (Tr. p. 137).

Along with his Answer and Motion to Dismiss, the Attorney General has submitted a certified true copy of Petitioner's FBI "rap sheet" which lists his prior known arrests and convictions. This sheet (minus the latest entries for the robbery and murder charges) was presumably what the district attorney used during the cross-examination in question. The "rap sheet" indicates that James Lee Hudson was arrested or received on November 21, 1966, charged with Rape, and received a two-year sentence. The next entry, directly below the rape charge, indicates that James Lee Hudson was arrested or received on February 17, 1967, charged with Assualt (sic) on a Female, and received a two-year sentence. The format of the "rap sheet" indeed makes it appear that Mr. Hudson was convicted of two separate offenses on two separate dates. However, as the Attorney General indicates in his Answer and Motion to Dismiss, these two entries apparently represent the same charge and a single conviction on the lesser charge of Assault on a Female. Presumably, Petitioner was initially arrested on a Rape complaint, but the charges was later reduced to Assault on a Female.

Given the misleading format in which the charges were reported on the F.B.I. "rap sheet", the Court finds that it was reasonable for the district attorney, Petitioner's attorney, or any reader thereof, to conclude that Petitioner had been convicted of two separate offenses. This Court also finds from review of the trial transcript that the district attorney inquired into the rape charge in good faith, and without any wrongful intent to put improper evidence before the jury. This Court also finds that the defense attorney acted without negligence and within the scope of competence expected of defense attornys when he relied on the reasonable interpretation of

the "rap sheet" and made no objection to questioning on the rape charge.

Having found that the district attorney acted in good faith and that Petitioner's counsel acted within the normal scope of competence, it remains this Court's duty to determine whether, regardless of these facts, the questioning on the rape charge prejudiced Petitioner's case to the extent that he was denied a fair trial and thus deprived of his constitutional rights to due process of law.

Petitioner has cited two cases which he argues presents the controlling law in this case, *Watkins v. Foster,* 570 F.2d 501 (4th Cir. 1978) and *Foster v. Barbour,* 613 F.2d 59 (1980). This Court finds that *Watkins* and *Foster* involved extreme factual situations which are distinguishable from the present case. In both *Watkins* and *Foster,* the presecution questioned the defendant with regard to *six* separate prior offenses attributable to the defendant, but for which there had been no convictions.

In *Watkins v. Foster,* the defendant was on trial for burglary, and the prosecutor, on cross-examination, questioned him in detail about six other burglaries. On the nature and form of these questions, the Court of Appeals quoted the language of the district court judge:

> To allow the prosecutor to ask questions about other alleged crimes, completely unsupported by fact or evidence, in the detail which was allowed here, makes a shambles of a fair trial and deprives the defendant of due process of law. 423 F.Supp. 53, 55 (W.D.N.C. 1976) *as cited at* 570 F.2d 505.

Additionally, the Court of Appeals found that,

> Aggravating the highly prejudicial nature of the questions was the fact that the trial judge never gave the

> jury any limiting instructions, never told them that they could only consider the exchange between the prosecutor and Foster on the issue of Foster's credibility and never reminded them that nothing the prosecutor said was itself evidence. 570 F.2d at 506.

In *Foster v. Barbour,* the defendant was charged with felony murder for a murder committed during the course of a robbery. On cross-examination, the prosecutor asked the defendant whether or not he had been convicted of four charges of larceny from stores, robbery, possession of marijuana, receipt of stolen goods, resisting arrest, and larceny from two other stores. 613 F.2d at 60. In finding the questions to be improper, the Fourth Circuit Court of Appeals stated that

> the repeated assertion that Foster had been convicted of other crimes, particularly larceny and robbery, when these charges were untrue, in a trial on the charge of homicide in the course of a robbery, destroyed the fairness of Foster's trial and deprived him of due process of law.

613 F.2d at 60.

The circumstances in *Watkins* and *Foster* offer examples of egregious over-striding of permissible bounds by the prosecution. And in each of those cases, it is clear that the defendant was prejudiced by the cumulative effect of several and successive inferences created by inadmissible evidence of prior bad acts. In the present case, the prosecutor merely questioned Petitioner in a general manner about a single rape offense, without using accusatory language or waiving official looking documents before the jury as occurred in the *Foster* and *Watkins* cases. And during the same colloquy in question, the Petitioner readily admitted to having been convicted of both Assault on a

Female and Larceny. Given the fact that these two properly admissible charges were presented to the jury, this Court finds that any additional impeachment of Petitioner's credibility resulting from mention of the single rape charge was minimal.

Additionally, this Court notes that, unlike the situation in *Watkins*, the jury in the present case received appropriate instructions from the court on the proper consideration to be given to the defendant's prior convictions.** Although the instructions came in the judge's final charge to the jury rather than at the time of the cross-examination, this Court finds that the instructions afforded Petitioner sufficient protection from any undue prejudice.

Finally, this Court finds that any prejudice that resulted from the questioning on the rape charge was outweighed by the substantial other evidence offered against Petitioner at his trial. In discussing the proper standard to be used in balancing the alleged prejudicial questioning and the other evidence presented at trial, the Fourth Circuit, citing the Supreme Court, stated the following in the *Watkins* case:

**In his charge to the jury, the trial court stated:

> I further instruct you that there is evidence tending to show that the defendant at sometime in the past has been convicted of a crime. Here again you may consider this evidence for one purpose only—if you believe, considering the nature of the crime, that it bears on his truthfulness, you may consider it together with all the other facts and circumstances bearing upon his truthfulness in deciding whether you will believe or disbelieve his other testimony at this trial. This evidence may not be considered by you in your determination of any other fact or circumstance in this case. You may not convict the defendant in these cases or either of them because of anything he may have done in the past. (Tr. p. jc-4).

> "The question is whether there is a reasonable possibility that the [improper cross-examination] . . . might have contributed to the conviction." *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963). If the other evidence in the case had been overwhelming, the answer to this question would be "no." 570 F.2d at 506 n.6.

The only other evidence offered in *Watkins* was "secondhand and questionable evidence of a single latent fingerprint on a flower pot." 570 F.2d at 506, (quoting the district court's opinion at 423 F.Supp. at 55). In the present case, however, there is the substantial evidence offered in the testimony of a confessed accomplice to the crime. Although he received a grant of immunity for his testimony, James Garris was undoubtedly a credible witness in the jury's mind, despite repeated challenges by the defense that he lacked credibility. Garris offered his story five years after the crime occurred while he was in jail on the far less serious charge of burglary. Further, his knowledge and memory of the events was corroborated in part by another witness to the crime, Bob Cavin.

Thus, in light of the substantial other evidence indicating his guilt, and his own admissions to two other prior convictions while on the stand, this Court finds that Petitioner was not unduly prejudiced in the defense of his case by the district attorney's questioning him on the single charge of rape. Consequently, the Court finds that this contention does not merit Petitioner relief, either in its underlying substance, or on the grounds that his counsel rendered him ineffective assistance of counsel.

The second contention raised by Petitioner is that he received ineffective assistance of counsel when his attorney failed to object to or argue on appeal the absence of

instructions on lesser degrees of homicide. Yet the state's evidence established that the homicide was committed during the course of a robbery, thereby making it first degree murder under the state's felony-murder statute, (N.C. General Statute §15-17). Further, the Petitioner merely denied participation in the crime and offered no evidence reflecting on any lesser degree of homicide. In such a situation, where there simply is no evidence before the jury of any lesser degree of homicide, the defendant is not entitled to instructions on such lesser degrees. *North Carolina v. Snead,* 295 N.C. 615 (1978); *North Carolina v. Flippin,* 280 N.C. 682 (1972). Since the trial court's instructions were proper under North Carolina law, the attorney for Petitioner would have gained nothing by making objections or appellate arguments on this point. Consequently, this Court finds that Petitioner's attorney did not act outside the scope of competence normally expected of defense attorneys when he did not object or argue for an instruction on lesser degrees of homicide. *Marzullo v. Maryland,* 561 F.2d 540 (4th Cir. 1977), *cert. denied,* 455 U.S. 1011, (1978).

Petitioner's third contention asserts that his attorney rendered ineffective assistance of counsel when he failed to object or argue on appeal that he had twice been placed in jeopardy. As a basis for this contention, Petitioner argues that for the state to prosecute him for both felony-murder, with armed robbery constituting the underlying felony, and armed robbery, he was thus twice subject to jeopardy on the robbery charge. This claim is patently without merit.

When the state prosecuted Petitioner on these two charges, the situation amounted to simultaneous jeopardy

on two offenses, one of which was a lesser-included offense of the other. The Supreme Court has stated that the guarantee against double jeopardy consists of three separate constitutional protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

At the time of his prosecution on these offenses, Petitioner had not previously been convicted or acquitted of the same crimes or any crime arising out of the same underlying events. And as to his punishment, the trial court properly arrested judgment on the armed robbery conviction after sentencing Petitioner on the felony-murder conviction. Consequently, this Court finds that Petitioner was not placed in double jeopardy during his trial, and that his attorney did not act outside the scope of competence normally expected of defense attorneys when he declined to argue or appeal a double jeopardy issue in this case. *Marzullo, supra.*

In his next contention, Petitioner asserts that "Modern Law" requires "that when a co-defendant's testimony is all the evidence against defendant, the testimony of the co-defendant must be corroborated to find a defendant guilty beyond a reasonable doubt." This is an incorrect statement of the law. As established by numerous cases, the uncorroborated testimony of an accomplice is sufficient to sustain a conviction, especially where cautionary instructions are given to the jury. *United States v. Clark,* 541 F.2d 1016 (4th Cir. 1976); *Smith v. Paderick,* 519 F.2d

70 (4th Cir.), *cert. denied, sub nom Smith v. Riddle,* 423 U.S. 935 (1975); *United States v. Washington,* 429 F.2d 409 (4th Cir.), *cert. denied,* 400 U.S. 919 (1970). In the present case, the trial court offered cautionary instructions on the scrutiny to be given to accomplice testimony, to testimony of those given immunity by the state, and to the credibility of witnesses who have been convicted of prior crimes. This Court finds that the accomplice testimony in this case was sufficient to sustain a conviction as a matter of law, and that Petitioner's interests were completely protected by the instructions given to the jury by the state trial court. Consequently, there being no valid argument to make on these grounds, Petitioner's counsel acted within the scope of competence normally expected of criminal defense attorneys when he declined to make objections or appellate arguments on the sufficiency of uncorroborated accomplice testimony. *Marzullo, supra.*

As a collateral argument to the above, the Petitioner argues that all elements of the offense were not proven against him. Specifically, Petitioner asserts that

> the state never asked the co-defendant if Mr. Lineberger did in fact give his permission to be robbed and killed, and permission in this case must be proven beyond a reasonable doubt. . . .

In answer to this argument, the Court will simply state that all elements of an offense need not be proven by direct testimony, but may be deduced from circumstantial evidence and reasonable inferences. Clearly, in this case the jury could find from the other evidence and reasonable inferences that Mr. Lineberger did not consent to the taking and carrying away of a large sum of money

from his store by armed robbers, nor that he consented to being killed by a shotgun blast to the neck. The failure of Petitioner's attorneys to make this argument clearly does not amount to ineffective assistance of counsel within the standard set out in *Marzullo, supra.*

In his final contention, Petitioner makes a general reassertion of his ineffective assistance of counsel argument and offers one additional specific example. Petitioner argues that his attorney wrongfully declined to make efforts to have favorable polygraph evidence admitted into evidence. This contention is without merit as it is firmly established that polygraph evidence is incompetent in North Carolina to prove the guilt or innocence of a defendant charged with a crime. *North Carolina v. Stephens,* 300 N.C. 321 (1980); *North Carolina v. Foye,* 254 N.C. 704 (1961). Since the polygraph evidence was clearly inadmissible under state law, this Court finds that Petitioner's attorney did not act outside the scope of competence normally expected of criminal defense attorneys when he declined to press for admission of such evidence. *Marzullo, supra.*

Having reviewed each of Petitioner's contentions and found them to be lacking in merit both as to their underlying substance and as to their bearing on the claim of ineffective assistance of counsel, this Court finds that the Petitioner is not entitled to the relief sought and HEREBY ORDERS that the writ of habeas corpus be denied and that the Attorney General's Motion to Dismiss the petition be granted.

Petitioner is advised that he may appeal *in forma pauperis* from this *final* Order by forwarding a written

notice of appeal to the Clerk of the United States District Court, Post Office Box 466, Statesville, North Carolina 28677. Said *written* notice of appeal must be received by the Clerk within thirty (30) days from the date of filing of this Order, and may be filed without the prepayment of costs or the giving of security therefor. The Court declines to issue a certificate of probable cause in this case.

This the 11th day of June, 1982.

/s/ Robert D. Potter
United States District Court Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-6300

James Hudson,

Appellant,

v.

Samuel P. Garrison, Warden, and the Attorney General of the State of North Carolina, Rufus L. Edmisten,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Robert D. Potter, District Judge. (C/A St-C-81-141)

Argued: December 7, 1983 Decided: April 18, 1984

Before PHILLIPS and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

J. David James (Jonathan R. Harkavy, Nahomi Harkavy, Smith, Patterson, Follin, Curtis, James & Harkavy on brief) for Appellant; Richard N. League, Special Deputy Attorney General (Rufus L. Edmisten, Attorney General of North Carolina on brief) for Appellees.

PER CURIAM:

James Hudson was convicted by a jury of robbery with a dangerous weapon and murder in the first degree. After a North Carolina state court sentenced Hudson to life imprisonment, he filed a petition for a writ of habeas corpus *pro se* in the United States District Court for the Western District of North Carolina pursuant to 28 U.S.C. § 2254. The district court granted the state's motion to dismiss and denied issuance of the writ of habeas corpus.

On appeal, Hudson asserts, *inter alia*, that he was denied a fair trial under the fourteenth amendment because of prosecutorial misconduct. Finding merit in this argument, we reverse.

I.

In 1977, James Garris, a convicted felon, implicated Hudson in a 1972 robbery and murder that occurred at Lineberger's Service Station and Grocery Store near Mooresville, North Carolina. Garris confessed to being an accomplice in the robbery and agreed to testify for the state in return for a grant of immunity.

Hudson was arrested and tried in August of 1977. The state's case hinged on the testimony of Garris. Indeed, two other witnesses for the state failed to link Hudson to the crime. Hudson testified in his own defense and denied any involvement in the robbery and murder.

During cross-examination, the prosecutor asked Hudson if he had been convicted of rape in 1966. Hudson denied having been convicted for rape but acknowledged a conviction for assault on a female in 1967. In his closing argument to the jury, the prosecutor intimated that Hudson had a propensity for rape and other criminal activity.[1]

---

[1]The district court found that the prosecutor inquired into the rape charge in good faith without any wrongful intent to put improper evidence before the jury. The format of Hudson's FBI "rap sheet" made it appear that Hudson was convicted of two separate offenses on two separate dates. However, Hudson was initially arrested on a rape charge that was later reduced to assault on a female. We do not disagree with the district court's conclusion regarding the prosecutor's initial cross-examination. However, once Hudson denied a rape conviction, the prosecutor had no basis for implying in his closing argument that someone else was likely to be a rape victim. The prosecutor stated:

(Continued from previous page)

Several times during the closing argument the prosecutor expressed his personal opinion regarding Hudson's guilt and vouched for the integrity of Garris's testimony. We hold that these incidents of excessive prosecutorial zeal denied Hudson a fair trial.

II.

First, we note that professional standards prohibit the interjection of personal opinion at trial by an attorney. The Code of Professional Responsibility of the American Bar Association states:

> DR 7-106(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

Further, the American Bar Association's Standards for Criminal Justice No. 3-5.8 provide:

> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the

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(Continued on following page)

All I want to say to you is this. The State of North Carolina would not have offered the testimony of James Donald Garris if we didn't believe it was true. . . . I don't imagine anybody enjoys being part of a killing and a part of a robbery, except those people that are mean. Boys, don't you kid yourself, there is a lot of mean people in this world, they will kill you for a nickel, steal everything you have got, *rape you,* beat you up, and ultimately kill you. They are mean. James Hudson, the defendant seated over here with a shirt and tie on, look at him—he is mean—he is mean. . . . (emphasis added).

truth or falsity of any testimony or evidence or the guilt of the defendant.

"Prejudicial statements are doubly inexcusable when they are made by a prosecuting attorney." *United States v. Bess,* 593 F.2d 749, 753 (6th Cir. 1979). In *Berger v. United States,* 295 U.S. 78, 88 (1935), the Supreme Court stated:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

The prosecutor's closing argument to the jury in which he implied that Hudson had a propensity for rape, personally vouched for the integrity of the state's witness, and expressed his belief in Hudson's guilt by saying "thank the good Lord we got the people who did it" was unquestionably prejudicial.

We, therefore, turn to the merits of Hudson's argument that the prosecutor's conduct so prejudiced his trial as to deny him due process of law guaranteed by the fourteenth amendment. "Due process is not violated unless the error constitutes 'a failure to observe that funda-

mental fairness essential to the very concept of justice.'" *Miller v. North Carolina,* 583 F.2d 701, 706 (4th Cir. 1978) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 642 (1974)).

A prejudicial argument by the prosecutor seriously threatens the defendant's right to a fair trial because the prejudice undermines the jury's impartiality. Nothing is more fundamental to a fair trial than an impartial jury. 583 F.2d at 706.

In some instances the trial judge may effectively dispel the prejudice by giving an immediate and decisive curative instruction. Even if this were a case where a curative instruction could have dispelled the prejudice, none was given. The prosecutor's flagrant remarks went unnoticed by the trial judge. Defense counsel, however, did not object to the prosecutor's closing statements to the jury. In *United States v. Sawyer,* 347 F.2d 372, 374 (4th Cir. 1965), we stated that:

> While ordinarily, if defense counsel does not object during the course of the Government's closing argument he may be said to have waived the point, there may be instances where the failure to object to a grave violation manifestly stems from the attorney's fear that an objection would only focus attention on an aspect of the case unfairly prejudicial to his client. If the presiding judge perceives that trial counsel has been placed in this dilemma, it is the judge's duty, on his own initiative, to interrupt, admonish the offender and instruct the jury to disregard the improper argument.

We perceive that the failure to object here may have stemmed from a fear of focusing attention on the prosecutor's prejudicial statements.[2]

When the jury was exposed to the prosecutor's highly prejudicial closing argument and the trial judge failed to give a curative instruction, we think that the prejudice engendered was so great that Hudson was deprived of a fair trial. In this instance, Hudson has met his burden of establishing fundamental unfairness. The jury's impartiality as a fact finder was fatally compromised. Under such circumstances, "the error infects the entire proceeding making it impossible to evaluate the effect of the error on the jury." *Miller v. North Carolina,* 583 F.2d 701, 708 (4th Cir. 1978). Therefore, reversal must be automatic. We are persuaded that in this case the harmless error rule is inapplicable. *See* 583 F.2d at 708. *Cf. Chapman v. California,* 386 U.S. 18, 23 n.8 (1967) ("some constitutional rights [are] so basic to a fair trial that their infraction can never be treated a (sic) harmless error," *e.g.,* coerced confession, right to counsel, impartial judge). However, considering the closeness of the question, the error could not be harmless beyond a reasonable doubt even if the harmless error rule is applied.

Accordingly, the judgment is reversed and the case remanded to the district court with instructions to issue a writ of habeas corpus unless, within a reasonable time, Hudson is retried.

REVERSED AND REMANDED.

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[2]In the habeas proceeding in the district court, the government did not raise defense counsel's failure to object at trial. Therefore, we decline to address the other arguments raised by the government on this issue.

ORIGINAL

No. 83-2144

SUPREME COURT OF THE UNITED STATES

October Term, 1983

****

SAMUEL P. GARRISON, et al.,

Petitioners

v.

JAMES LEE HUDSON,

Respondent

****

ON WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

BRIEF IN OPPOSITION TO CERTIORARI

****

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BRIEF IN OPPOSITION TO CERTIORARI

****

Respondent James Lee Hudson ("Hudson"), by his counsel and pursuant to this Court's Rules 22 and 46, submits this brief in opposition to the petition for certiorari filed by the petitioners, Samuel P. Garrison, Warden, and the Attorney General of the State of North Carolina, Rufus L. Edmisten ("State").

STATEMENT OF THE CASE

The facts which are material to consideration of the questions presented by the petition for certiorari are contained in the Statement of the Case in the petition and in the first three pages of the Fourth Circuit's decision reproduced in Appendix C to the petition for certiorari. Pet. for Cert., App. 20-22.

ARGUMENT

The State suggests three reasons for granting certiorari in this case. As demonstrated below, the Fourth Circuit's unremarkable handling of this habeas corpus case in no way conflicts with applicable decisions of this Court or of other courts of appeals and thus presents no special and important reasons for plenary review. Sup. Ct. Rule 17.1.

1. The State's primary argument that the Fourth Circuit failed to follow Duckworth v. Serrano, 454 U.S. 1 (1981) because Hudson did not exhaust his state remedies on the prosecutorial misconduct issue is plainly wrong as a matter of fact. The North Carolina Supreme Court expressly dealt with Hudson's contention that the district attorney's jury argument was "so improper, inflammatory and prejudicial that it denied defendant a fair and impartial trial." State v. Hudson, 295 N.C. 427, 245 S.E.2d 686, 692 (1978). No matter how the State tries to recast the prose-

cutorial misconduct issue, the fact remains that Hudson exhausted his state remedies with respect to that issue, and there is no possible conflict with Duckworth warranting review by this Court.

2. The State next suggests that the Fourth Circuit's "viewpoint" on prosecutorial vouching with respect to the credibility of witnesses conflicts with the decisions of five other courts of appeals. The suggested "viewpoint" on vouching is beside the point, for the ruling below is not premised simply on vouching. What the Fourth Circuit held to be "unquestionably prejudicial" was "[t]he prosecutor's closing argument to the jury in which he implied that Hudson had a propensity for rape, personally vouched for the integrity of the state's witness, and expressed his belief in Hudson's guilt by saying, 'Thank the good Lord we got the people who did it.'" (Pet. for Cert., App. 23) By resting its due process holding on several "incidents of excessive prosecutorial zeal," (ibid. at App. 22) the Fourth Circuit marked this case as different from cases expressing a viewpoint solely on the unconstitutionality of vouching.

Moreover, even if the Fourth Circuit's approach were more broadly read as a holding that vouching alone denied Hudson a fair trial, that holding is compatible in principle with the approach of the five other courts of appeals cited by the State. None of the cases, including this one, depart from the standards of Donnelly v. DeChristoforo, 416 U.S. 640 (1974) and Berger v. United States, 295 U.S. 78 (1935). Each decision, including the present one, assesses vouching in the total context of the criminal trial. The fact that different results are reached is attributable not to a conflict in legal standards or a departure from this Court's holdings in Donnelly and Berger, but solely to the different context in which the vouching occurred.

Finally, in the present case the district attorney clearly implied that he had unrevealed knowledge of Hudson's guilt when

he remarked to the jury:

> "When I have knowledge from my officers and the SBI that a man has committed Murder and Armed Robbery and participated in it by heavens, I'm going to bring him to justice." Pet. for Cert., p. 7.

Another portion of the district attorney's closing argument underscored this implication of superior knowledge of guilt:

> "It ain't the most beautiful case I ever prosecuted, I'm not going to tell you any lie — it has some holes in it. A five-year-old Murder and Robbery is going to have holes in it, but thank the good Lord we have got the people who did it." Pet. for Cert., p. 6.

Given the clear implication of unrevealed evidence of guilt in the district attorney's vouching remarks and given the fact that this vouching occurred in the context of a trial which hinged solely on the testimony of a State witness for whom the district attorney blatantly vouched, it is clear that the decision below is in conformity with the approach to vouching in the five cases cited by the State.

In no legitimate way, therefore, can there be said to be a conflict between the decision below and the decisions of other courts of appeals which warrants the exercise of this Court's certiorari jurisdiction.

3. Finally, the State expresses simple disagreement with the Fourth Circuit's conclusion that the several incidents of excessive prosecutorial zeal "fatally compromised" the jury's impartiality and thus denied Hudson due process of law. Recognizing that its disagreement with this conclusion is not a substantial ground for a writ of certiorari, the State did not include it in its motion for stay of execution as an issue having a reasonable probability of acceptance for review. Nonetheless, the State now suggests that the Fourth Circuit's decision fails to follow the role differentiation in collateral proceedings noted by this Court in United States v. Frady, 456 U.S. 152 (1982).

The State's suggestion of a departure from the established standards of collateral review noted in Frady is preposterous

in light of the Fourth Circuit's express recognition that Hudson had the burden of establishing fundamental unfairness, not just ordinary trial error. Pet. for Cert., App. 25. Contrary to the State's assertion that this case involves only errors akin to the admission of irrelevant or misstated evidence, here the jury's impartiality was irreparably subverted by a false implication that Hudson had a propensity for rape, by the district attorney's personal vouching for the integrity of the State's key witness, and by the district attorney's unrestrained expression of personal belief in Hudson's guilt. In light of these facts the Fourth Circuit correctly held that Hudson had carried his burden of establishing fundamental unfairness. The State's argument on this point is simply that it disagrees with the Fourth Circuit's conclusion because it believes the conclusion to be erroneous. As the State conceded, however, in its petition for certiorari, "error alone is not a basis for obtaining certiorari." Pet. for Cert., p. 10. See also Sup. Ct. Rule 17.1.

CONCLUSION

For all of the foregoing reasons, and particularly because the State has failed to present any special and important reasons for review as required by Rule 17.1, Hudson prays that the State's petition be denied.

July 26, 1984.

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No. 83-2144

In The

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October Term, 1983

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SAMUEL P. GARRISON, ET AL.,

Petitioners,

v.

JAMES HUDSON,

Respondent.

—o—

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

—o—

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No. 83-2144

In The

Supreme Court of the United States

October Term, 1983

SAMUEL P. GARRISON, ET AL.,

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Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§ 15A-1419. *When motion for appropriate relief denied.*

(a) The following are grounds for the denial of a motion for appropriate relief:

(1) Upon a previous motion made pursuant to this Article, the defendant was in a

position to adequately raise the ground or issue underlying the present motion but did not do so. This subdivision does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right. This subdivision does not apply when the previous motion was made within 10 days after entry of judgment.

(2) The ground or issue underlying the motion was previously determined on the merits upon an appeal from the judgment or upon a previous motion or proceeding in the courts of this State or a federal court, unless since the time of such previous determination there has been a retroactively effective change in the law controlling such issue.

(3) Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so.

(b) Although the court may deny the motion under any of the circumstances specified in this section, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious.

———o———

ARGUMENT

James Hudson, for the first time, has made the claim in his Brief in Opposition that he has exhausted state remedies on his vouching issue by direct appeal. Although in that appeal, his lawyer raised five issues concerning

the jury argumment, his assertion that this exhausted state remedies is incorrect for the relevant arguments made in the Fourth Circuit were not made in the state Supreme Court. Copies of the North Carolina Supreme Court opinion, the record on appeal in state court and defendant's appeal brief are submitted in support of this position.

Defendant's first state court appellate argument on the District Attorney's summation was as follows:

> Was the argument of the District Attorney for the State so misleading and inflammatory and prejudicial against the defendant that the argument denied the defendant a fair and impartial trial and that therefore entitled him to a new trial?

His argument in this regard related to a reference by the District Attorney that the jury should not hold a prior conviction against his witness. This is not included in the excerpts cited or the arguments made to the Fourth Circuit as error and was not argued as error in the Fourth Circuit.

Defendant's next state court appellate argument on the District Attorney's summation was as follows:

> Were the remarks of the District Attorney for the State so inflammatory and prejudicial against the defense counsel that they denied the defendant a fair and impartial trial and that, therefore, entitled him to a new trial?

His argument in this regard asserted that his lawyer was held up to ridicule and the defendant's guilt was implied by the argument made by the prosecutor. No specifics were given although three cases were cited. Six page references were cited in the Assignments of Error—R p 52, 53, 54, 55, 56 and 59—however only R p 59 contained any

of the six references he now relies on (Petition for Certiorari pp 6-7):

> It ain't the most beautiful case I ever prosecuted, I'm not going to tell you any lie—it has some holes in it. A five year old Murder and Robbery is going to have some holes in it, but thank the good Lord we have gotten the people who did it. Now its up to you to say what justice is in this County on this evidence.

This indirect connection is one of two overlaps between petitioner's direct appeal and his Fourth Circuit appeal and the assignments of error did not reference this portion of R p 59 as the error complained of there.

Defendant's next state court appellate argument on the District Attorney's summation was as follows:

> Was the argument of the District Attorney which refers to the criminal record of the defense witness, Linder, prejudicial and inflammatory, thereby denying the defendant a fair and impartial trial, and therefore entitling him to a new trial?

His argument in this regard was that Linder's credibility was attacked in terms not supported by the evidence. This was not included by his Fourth Circuit excerpts or argument.

Defendant's next argument in state court on the District Attorney's summation was as follows:

> Was the argument of the District Attorney so inflammatory and prejudicial against the defendant that it denied the defendant a fair and impartial trial, and therefore entitled him to a new trial?

His argument in this regard was that the District Attorney referred to the defendant as "wicked" and "mean". This has nothing to do with vouching and nothing in this

regard was claimed. A reference to defendant being "mean" occurred in the paragraph in which "rape" had been mentioned and therefore was an excerpt presented to the Fourth Circuit. But this was done in the context of petitioner's main contention there—that the reference to the rape was constitutional error. This indirect connection is the other overlap between Defendant's arguments on direct appeal and on collateral appeal.

Defendant's last state court argument on the District Attorney's summation was as follows:

> Was the argument of the District Attorney which referred to a .38 pistol which was not introduced into evidence and not produced as a result of defendant's motion for discovery of physical evidence, prejudicial against the defendant, so that the defendant was denied a fair and impartial trial, and therefore entitled him to a new trial?

This is an assertion that the argument went beyond the evidence and is not something which was included in his Fourth Circuit excerpts and argument.

From the above, it can be seen that state remedies were not exhausted by Defendant with regard to the claim that he received relief on. Exhaustion requires the fair presentation of claims to the state courts but the use of different legal theories from those raised in state court do not constitute fair presentation under *Picard v. Connor*, 404 US 270 (1971) and *Anderson v. Harless*, 459 US 4 (1983). What Defendant hopes to gain by a claim of exhaustion is to avoid a presentation of these claims in state court which will almost certainly result in them being described as waived under NCGS § 15A-1419. An unfortunate decision in the Fourth Circuit, *Richardson v.*

Turner, 716 F.2d 1059 (4th Cir. 1982), precludes this decision by the federal judiciary in advance of an actual holding to this effect by a state court.

Submitted as the Reply Brief of Samuel P. Garrison, et al., this 2nd day of August, 1984.

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APPENDIX A:

EXCERPTS FROM DEFENDANT'S STATE CONRT APPEAL BRIEF

* * *

ARGUMENT NO. 6

Was the argument of the District Attorney for the State so misleading and inflammatory and prejudicial against the defendant that the argument denied the defendant a fair and impartial trial and that, therefore, entitled him to a new trial?

Exception No. 5 (R pp 70 and 38-63)
(Jury Argument) and (R p 49)

The defendant contends that the argument of the District Attorney for the State of North Carolina to the jury wherein the District Attorney stated that the witness, Garris, "has been into plenty. That doesn't make any difference whether or not you believe what he had to say about what happened June 29, 1972 down at Lineberger's Store in Mooresville." [*sic*] A witness' prior criminal convictions relate directly to his credibility for purposes of impeachment and the rule of law is contrary to the misleading statement which the District Attorney made during his argument. The argument of the District Attorney was improper, prejudicial, and inflammatory, and thereby influencing the jury by not only intimating but directly stating that Garris' past had nothing to do with his credibility. Any instructions given by the Court during the course of the trial and in the Judge's charge with regard to credibility were insufficient to contradict this misleading statement.

ARGUMENT NO. 7

Were the remarks of the District Attorney for the State so inflammatory and prejudicial against the defense counsel that they denied the defendant a fair and impartial trial and that, therefore, entitled him to a new trial?

Exception No. 6 (R pp 52, 53, 54, 55, 56 and 59)

The defendant contends that the remarks of the District Attorney for the State of North Carolina to the jury during his argument concerning the counsel for the defendant were inflammatory and prejudicial in that they held the defendant's counsel in light of ridicule to the jury and implied the defendant's guilt. In support of this assignment, the defendant calls attention to several North Carolina Supreme Court decisions involving prejudicial remarks of the District Attorney, said decisions being as follows: STATE v SMITH, 240 NC 631; STATE v TUCKER, 190 NC 708 and STATE v MILLER, 271 NC 646.

In STATE v SMITH the Court cited STAR v OIL COMPANY, 165 NC 587, in saying "Court should be very careful to safeguard the rights litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution of defense of his cause, by extraneous considerations, which militate against a fair hearing". The District Attorney's remarks during the argument were of such a nature that they held the defense attorney in ridicule and it is argued by the defendant that these remarks were extraneous considerations, which militated against a fair hearing for the defendant.

In STATE v TUCKER, the Court cited Bynum, J., in COBLE v COBLE, 79 NC 590, as follows: "some allow-

ance should be made for the zeal of counsel and the heat of debate, but here the language and meaning of counsel were to humiliate and degrade the defendant in the eyes of the jury and bystanders—a defendant who had not been impeached by witnesses, by his answer to the complaint or by his conduct of the defense, as it appears of record. Such an assault is no part of the privilege of counsel and was well calculated to influence the verdict of the jury. In the instant case the defendant contends that the State attacked the defendant's credibility indirectly by attacking the credibility of his attorney through remarks made by the District Attorney during the argument. In the case of STATE v TUCKER, the Supreme Court, awarded a new trial to the defendant, said "to uphold this ruling (the Judge's ruling that the remarks of the Solicitor could stand) would mean, not only to sanction the vituperative language used in the present case, but also to open the door for advocates generally to engage in vilification and abuse—a practice which may be all too frequent, but which the law rightfully holds in reproach. If verdicts cannot be carried without appealing to the prejudice or resorting to unwarranted denunciation, they ought not to be carried at all. We think the course pursued in the instant case was detrimental to the defandant." In the instant case the defendant contends that the District Attorney has gone beyond the bounds of propriety in his comments made during the argument and that his remarks were so prejudicial and inflammatory as to warrant a new trial.

ARGUMENT NO. 8

Was the argument of the District Attorney which refers to the criminal record of the defense witness, Linder,

prejudicial and inflammatory, thereby denying the defendant a fair and impartial trial, and therefore entitling him to a new trial?

Exception No. 7 (R p 58)

The defendant contends that the argument of the District Attorney for the State of North Carolina to the jury was inflammatory and prejudicial wherein the District Attorney stated that the key defense witness, Linder, was "serving big time from Union County, kidnapping, felonious assault, every other kind of felony you could think of." While the Solicitor may comment on the credibility of the witnesses, the Solicitor may not distort the facts to the extent that it will prejudice the jury. In the instant case, the defendant contends that the District Attorney has gone beyond the bounds of propriety in his comments made during the jury argument, and that there is nothing in the evidence to warrant the remarks made by the District Attorney or to indicate that there is any factual basis for his remarks. The remarks of the District Attorney were inflammatory and prejudicial and highly improper thereby denying the defendant a fair and impartial trial.

ARGUMENT NO. 9

Was the argument of the District Attorney so inflammatory and prejudicial against the defendant that it denied the defendant a fair and impartial trial, and therefore entitled him to a new trial?

Exception No. 8 (R pp 72 and 38-63) (Jury Argument)

The defendant contends that the remarks of the District Attorney for the State of North Carolina during the Jury Argument were inflammatory and prejudicial in that

they held the defendant in a light of ridicule and subjected the defendant to unwarranted abuse wherein the District Attorney called the defendant "wicked" and later in this argument called the defendant "mean". These remarks were calculated by the District Attorney to prejudice the defendant in the eyes of the Jury and were grossly improper. Coupled with the other comments made my the District Attorney with regard to the defendant, the defendant's witness, Linder, and the defendant's counsel, the defendant contends that the District Attorney went beyond the bounds of propriety in his argument and that while taking individually the remarks of the District Attorney during his argument may not be grossly improper so as to warrant a new trial, collectively the remarks of the District Attorney were grossly prejudicial against the defendant and deprived the defendant of a fair and impartial trial.

ARGUMENT NO. 10

Was the argument of the District Attorney which referred to a .38 pistol which was not introduced into evidence and not produced as a result of defendant's motion for discovery of physical evidence, prejudicial against the defendant, so that the defendant was denied a fair and impartial trial, an therefore entitled him to a new trial?

Exception No. 9 (R pp 54 thru 55)

The defendant contends that the argument of the District Attorney for the State of North Carolina was in error wherein the District Attorney repeatedly referred to a .38 pistol which was not introduced into evidence and which was not produced as a result of the defendant's motion for discovery of physical evidence. For real evidence to be exhibited it must be properly identified, see KALE v

DAUGHERTY, 8 NC App 417, 174 SE 2d 846 (1970), and the real evidence must be offered into evidence, and it is improper for counsel in argument to offer to show it to the jury when it has not been put into evidence, see STATE v EAGLE, 233 NC 218, 63 SE 2d 170 (1951). The case at bar differs from the case of STATE v CARTER, 17 NC App 234, 193 SE 2d 281 (1972), *cert. denied*, 283 NC 107 (wherein the North Carolina Court of Appeals ruled in a breaking and entering, and larceny in receiving case, that it was not prejudicial error to allow a Solicitor, in argument, to refer to a box of cigars and cigarettes identified by State's witness, marked as exhibit, and on display before the Jury, even if never formally introduced). In the case at bar the pistol was not produced by the District Attorney pursuant to the request for discovery filed June 7, 1977 nor was it produced pursuant to the motion for discovery filed August 3, 1977. The pistol would have been excluded from evidence for several different reasons, and as the District Attorney mentioned in his argument "the State didn't offer this gun into evidence because the gun was obtained from a woman who was not in court; we couldn't offer it into evidence, but Mr. Benbow didn't catch that either." The very nature of the real evidence, a pistol, which was allegedly taken during a vicious murder had a tremendous effect on the jury and could have well been the turning point in the jury's reaching its decision. Then to have the District Attorney argue that the defense counsel had helped to prove that the pistol was obtained from a woman who was not in court was extremely inflammatory and prejudicial and completely outside of the rules of evidence. In the case at bar the pistol had much more of an effect on the jury than did the box of cigars in the

STATE v CARTER case. In addition, in the STATE v CARTER case, the box of cigars could have been introduced into evidence, however, it appeared that the State inadvertently forgot to do so. In the case at bar, the pistol could not have been introduced into evidence, if the State had attempted to do so. However, the State did not attempt to introduce the pistol into evidence; the State was merely content to wave the pistol in front of the jury both during the presentation of evidence and during the argument and to have the pistol sit on the jury rail in full view of the jury during the trial.

APPENDIX B:

EXCERPTS FROM DEFENDANT'S STATE COURT ASSIGNMENTS OF ERROR

* * *

EXCEPTION NO. 4

IV. After the close of the evidence and after the argument of the defense counsel, the district attorney argued to the jury. The following argument was made by the district attorney:

> "As Mr. Benbow says, if you are going to try the devil, you have to go to hell to get your witnesses. I'm not telling you Garris is any Sunday School teacher—he has been into plenty. He has been into plenty. That doesn't make any difference whether or not you believe what he had to say about what happened June 29, 1972, down at Lineberger's Store in Mooresville."

EXCEPTION NO. 5

V. The district attorney further argued: "Mr. Benbow got up here and unbelievably at that point agreed this entire statement could go into evidence that Garris gave." The district attorney continued his argument and later stated, "He could also hear, like, a man talking in there, but here is what he said in the statement—Mr. Benbow didn't keep it out, he could have objected, but didn't." The district attorney further argued, "The State didn't offer this gun into evience because the gun was obtained from a woman who was not in court; we couldn't offer it into evidence, but Mr. Benbow didn't catch that either." The district attorney further argued, "If I had to prove that about his wife, I didn't have her here either, but Mr. Benbow

helped me prove it." The district attorney further argued, "The State of North Carolina is trying James Hudson, that man seated there in that shirt and tie—I bet his attorney bought it for him—we are trying him for that murder as being part of it." The district attorney further argued: "That's what we were trying, it's not as Mr. Benbow told you a minute ago that when the judge tells you the law also you listen, and then the relation that inference was made, listen to what Mr. Benbow wanted you to and nothing else;" The district attorney further argued: "That's the same thing every defendant's attorney does in the trial of any case is to try to put up a smoke screen and to discredit the testimony of the State's witness."

EXCEPTION NO. 6

VI. The district attorney argued as follows: "What do witnesses tell you—What did Linder tell you—Linder got on the stand just like Hudson, smiling and sure of himself, told you 'yes, sir,' he is serving big time in Union County, for kidnapping, felonious assault, and every other kind of felony you can think of, has the nerve to sit there and tell you he was coming up here and admit this if he did it when he pled not guilty in Union County."

EXCEPTION NO. 7

VII. The district attorney further argued: "I stand here and argue to you and Mr. Benbow stands here for that man who is young; I say to you who is wicked, and who participated in the armed robbery and killing of a middle aged man." And the district attorney further argued: "James Hudson, the defendant seated over there with a shirt and tie on, look at him—he is m an—he is mean

because of June 29, 1972—he participated in a killing and has the audacity, even though he has the right, to come in and say, 'No, I didn't—prove it on me.'"

EXCEPTION NO. 8

VIII. The district attorney further argued: "You heard Garris say he got his pistol from Mackey as part of the proceeds, this very pistol. Now Mr. Benbow said, 'We don't know whose pistol'—let me tell you, law is common sense." The district attorney further argued: "Now if Mackey went into the station carrying a shotgun, that was all he had, and came out carrying a gun, I want to ask you whose gun this is." "The State didn't offer this gun into evidence because the gun was obtained from a woman who was not in court; we couldn't offer it into evidence, but Mr. Benbow didn't catch that either."

"Now, the State said that this is Lathan Lineberger's gun. It was taken by Mackey, brought out of the store, Mackey gave it to Garris, Garris sold it to Lewis, Lewis, in jail, gave it to his wife, Cook got it from his wife. If I had to prove that about his wife, I didn't have her either, but Mr. Benbow helped me prove it."

EXCEPTION NO. 9

APPENDIX C

EXCERPTS FROM NORTH CAROLINA SUPREME COURT OPINION, *STATE v. HUDSON*, 295 NC AT 435

* * *

[7] By his remaining five assignments of error, defendant contends that the district attorney's closing argument was so improper, inflammatory and prejudicial that it denied defendant a fair and impartial trial. Examples of some of the portions of the district attorney's argument to which defendant excepted are as follows:

> As [defense counsel] says, if you are going to try the devil, you have got to go to hell to get your witnesses. I'm not going to tell you Garris is any Sunday School teacher—he has been into plenty. That doesn't make any difference whether or not you believe what he has had to say about what happened June 29, 1972, down at Lineberger's Store in Mooresville.
>
> * * *
>
> I stand here and argue to you and [defense counsel] stands here for that man who is young; I say to you who is wicked, and who participated in the armed robbery and killing of a middle aged man. . . . James Hudson, the defendant seated over there with a shirt and tie on, look at him—he is mean—he is mean because of June 29, 1972—he participated in a killing and has the audacity, even though he has the right, to come in and say "No I didn't—prove it on me." . . .
>
> * * *
>
> You heard Garris say he got his pistol from Mackie as part of the proceeds, this very pistol. Now [defense counsel] said, "We don't know whose pistol" —let me tell you, law is common sense. . . . Now, if

> Mackie went into the station carrying a shotgun, that was all he had, and came out carrying a gun, I want to ask you whose gun this is. The State didn't offer this gun into evidence because the gun was obtained from a woman who was not in court; we couldn't offer it into evidence, but [defense counsel] didn't catch that either. . . . Now, the State said that this is Lathan Lineberger's gun. It was taken by Mackie, brought out of the store, Mackie gave it to Garris, Garris sold it to Lewis, Lewis, in jail, gave it to his wife, Cook got it from his wife. If I had to prove that about his wife, I didn't have her either, but [defense counsel] helped me prove it.

Defendant made no objections to the argument of the district attorney prior to the coming in of the verdicts.

Ordinarily, objections to argument of opposing counsel must be made at trial in order to give the trial judge an opportunity to stop the improper argument and to instruct the jury to disregard the prejudicial material. Nevertheless, we recognize that in capital cases, we may review the prosecution's argument even when timely objection to the argument is not made at trial. Even so, the impropriety of the argument must be flagrant in order for us to hold that a trial judge abused his discretion by not correcting, *ex mero motu*, an argument which defense counsel did not deem to be prejudicial. *State v. Smith*, 294 N.C. 365, 241 S.E.2d 674 (1978); *State v. Martin*, 294 N.C. 253, 240 S.E.2d 415 (1978); *State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974).

Our careful review of the district attorney's argument in this case discloses that he fulfilled the obligation of his office with zeal. His argument was based upon the evidence presented and was within the recognized bounds of propriety. Further, we have heretofore considered com-

ments similar in nature to those here specifically excepted to and found them to be without prejudicial error. *See, e.g., State v. Wortham*, 287 N.C. 541, 215 S.E. 2d 131 (1975); *State v. Stegman*, 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Noell, supra; State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971); *State v. Mullis*, 233 N.C. 542, 64 S.E. 2d 656 (1951). We find no prejudicial error in the argument of the district attorney.